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ABSTRACT

L. L. Guttman's scaling procedures were used to analyze United States Supreme Court decisions concerning the press for the period 1971-1981. Guttman scaling is essentially a means of determining whether a given set of responses is unidimensional, meaning that the responses are part of a single hierarchical continuum. The 44 press cases during the period were arranged from those most favorable to those least favorable to the press, while justices were ranked according to their favorability to the press (their overall record in the 44 cases). The resulting grid formed by the justices' votes on individual cases was 95% within the idealized triangular grid that Guttman scaling is supposed to produce when unidimensionality is evident. The fact that Supreme Court Justices' votes on press cases can be ordered on a Guttman scale above the 90% criterion is an indication that the decision making process on the Court is somewhat simpler than many analysts have suggested, possibly an indication that the Supreme Court decisions are politically motivated along liberal-conservative dimensions. Coupled with individual justices' voting trends and the increasing trend toward more decisions unfavorable to the press, the scaling data indicate that an antipress bloc on the Supreme Court is gaining strength.

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A Guttman Scale Analysis of the
Burger Court's Press Decisions

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A Guttman Scale Analysis of the Burger Court's Press Decisions

Last year's AEJ plenary session on the Burger Court and the First Amendment exemplified the growing interest in the Supreme Court's decision making process. The succession of decisions unfavorable to the press in the last decade has led to much speculation and deliberation on possible trends. However, this has hardly been either satisfying or conclusive. The Supreme Court decisions on the press in the last decade have offered something for everybody. We journalists have been as pleasantly surprised by Nebraska Press Association v. Stuart and Richmond Newspapers v. Commonwealth of Virginia as we were dismayed by Gannett v. DePasquale.¹ Within a single case, Gertz v. Welch, we have found cause for both cheer and dismay.² If there is a trend, it is not one easily discerned.

It would seem that an analysis of the overall record of the Court on press cases during this period would be useful. This paper is an attempt to do that by applying Guttman scaling, an item-analysis procedure widely used in the social sciences, to this group of decisions.³

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We have defined the period to be covered as beginning with the 1971-72 session and continuing to the present. What is referred to as the "Burger Court" by those analyzing decisions began not when Warren Burger became Chief Justice in 1969, but two years later when William Rehnquist and Lewis Powell became the third and fourth Nixon appointees on the Court. This also is a convenient period for analysis because it is one of unprecedented stability on the Court. Since 1971 there has been only one change--the resignation of Justice William O. Douglas and appointment of Justice John Paul Stevens in 1975. Never before has there been a 10-year period in which eight justices have served together on the Court. This would simplify any analysis of voting, but for Guttman scaling it is especially helpful.

Our analysis includes press cases, but not speech cases during that period. We imposed this limitation for three reasons. First, it is a limitation that seems logical for journalists. Second, we have compiled the record on speech cases and found that, in First Amendment terms, the Supreme Court in the last decade has been clearly less favorable on speech cases. Because of this, it seems to us that including them would confound matters. Third, this limitation makes the study more manageable, both from our standpoint and that of the audience. We found 50 cases that dealt with freedom of press as opposed to freedom of speech. In six of these cases, one or more justices did not participate, so we have discarded them from this analysis.⁴ We included only the votes of the eight justices who have been on the Court together these 10 years.

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Applying Guttman Scaling

Guttman scaling is essentially a means of determining whether or not a given set of responses is unidimensional. By unidimensional, we mean that the responses are part of a single hierarchical continuum. For example, suppose we ask persons these questions:

- 1) Add 2 and 2
- 2) Factor $A^2 - B^2$
- 3) Differentiate X^2 with respect to X

We would expect that a person who could answer the third question could also answer the first two. We would be greatly surprised if a person could answer Question 3 and not answer Question 1. For that matter, we would be very surprised if a person could answer Question 2 and not answer Question 1. Mathematics is organized and taught in such a way that a person deals with addition before factoring and factoring before differentiation. For that reason, if we knew that a person answered two of those questions correctly, we would assume that we knew which two (1 and 2). That is what we mean by unidimensionality. If we substituted the question "Who was the first secretary of state of the U.S.?" for the second question, we would not expect and probably not find any connection between the ability to answer that question and either of the other two. Our set would no longer be unidimensional.

Our example here uses responses to factual questions, but but attitudinal responses and sets of decisions or actions have been found to be unidimensional in some instances. Most pertinent for our purposes is Spaeth's finding, using Guttman scaling, that Supreme Court civil liberty decisions in 1960, 1961 and 1962 did from a unidimensional area.⁵

The question of unidimensionality is important first of all because complexity has so often been postulated with regard to Supreme Court decisions. The general impression is that a multiplicity of factors affect this decision-making process. The implication is that because of this, we outsiders really will not be able to understand the decision-making process.

Beyond this, Guttman scaling offers a rather convenient way to look at a set of responses. It helps one to get a sense of the whole picture rather than being restricted to dealing with one decision at a time.

Table 1 has been prepared in accord with the procedural rules of Guttman scaling. The decisions are arranged from those most favorable to the press (8-0) to those least favorable to the press (0-8). The Justices are presented in order from the least favorable to the press on the left to the most favorable to the press on the right. Favorability, of course, is determined on the basis of their votes on these 44 cases. What we have in Table 1 then is basically a triangular pattern, showing in general two things that Guttman scaling would presume: 1) The less favorable justices pro-press votes are toward the top of the table; 2) The justices who vote the press in the less favorable cases (1-7, 2-6, 3-5) also vote for the press in the cases in which the press gets wider support.

In a perfect Guttman scale, the triangle would be completely solid. Guttman refers to the deviations from that as errors. For example, on CBS v. Democratic National Committee, given that there

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are only six favorable votes, the favorable votes by Justice William Rehnquist and Chief Justice Warren Burger are errors in the Guttman scaling perspective. Note that we have underlined these responses, as we have all "error" responses in Table 1. Guttman's criterion for determining whether or not a set of responses is unidimensional, or as he refers to it, scalable, is that the number of errors must not exceed 10 percent of the responses. The number of "correct" responses thus must be at least 90 percent of the total number of responses. Guttman refers to the ratio of correct responses to total responses as the coefficient of reproducibility, a term we have used at the foot of the table.

Findings

We should begin by noting that the press lost a majority of the cases reported in Table 1. The verdicts were for the press in 19 cases (43 percent) and against the press in 25 cases (57 percent). If we add the six cases eliminated from our analysis because one or more justices did not participate, the tally is 22 for (44 percent) and 28 against (56 percent). That is in sharp contrast with the figure Padgett reported for the period 1931 to 1969. He found that the press won 60 of 95 cases or 63 percent.⁶ So, while the Burger Court has not been against the press all the time, it has been against it more than had previously been the case.

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The first thing that should be noticed in Table 1 is the wide range among the justices in frequency of voting for the press. Justice William Rehnquist voted for the press just 20 percent of the time, while Justice Thurgood Marshall voted for the press 89 percent of the time. In between were Chief Justice Warren Burger, 34 percent; Justices Harry Blackmun and Byron White, each 34 percent; Justice Lewis Powell, 48 percent; Justice Potter Stewart, 77 percent, and Justice William Brennan, 86 percent. Those figures suggest, and the table confirms that there is considerable block voting.

Justices Stewart, Brennan and Marshall voted the same way on 75 percent of these cases--usually for the press. Justices Burger, Blackmun, Powell and Rehnquist, the four Nixon appointees, voted together on 59 percent of these cases--usually against the press.

Overall, we do have a unidimensional area or what Guttman calls a scalable universe. There are only 19 errors in the 352 responses, and the coefficient of reproducibility is .95, well above the required .90. What is more important is that in 30 of the 44 cases, we have a perfect scale type--that is, no error responses on that case. That is unusually high and indicates that the Supreme Court votes on press cases meet the Guttman scaling criteria very well.

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It should be noted that this unidimensional area covers a wide range of press law topics. There are cases dealing with First Amendment protection, First Amendment access, libel, privacy, free press-fair trial, obscenity and freedom of information. What we have found is thus a consistent pattern of response by the justices on a wide variety of press situations. Likewise, the Constitutional issues involved are varied.

Discussion

When we say that these cases form a scalable universe or a unidimensional area, what does it tell us about the decision-making process? First of all, it tells us that there is one overriding factor in that decision making. There may be many factors that enter into Supreme Court decision making, but everything comes down to a single factor. Whatever that factor or attitude or predisposition is, it is such that Justice Rehnquist is consistently on the anti-press side of the continuum and Justices Marshall and Brennan even more consistently on the pro press side. The deviations from the continuum are infrequent.

What is the overriding factor? The temptation is to suggest that we have here is a liberalism-conservatism continuum. That is a conclusion which fits the data. There is not, however, conclusive proof that this is the answer. We could be dealing with judicial philosophy or how the justices view the Constitution.

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It would be nice, of course, to find an answer that speaks of some principle of jurisprudence. Yet those who see jurisprudence here must account for the fact that Justices Rehnquist and Marshall disagree 77 percent of the time. We think more of jurisprudence than that.

If it is shocking to suggest that what we are watching in the Supreme Court is politics, not jurisprudence, it should nonetheless come as not much of a surprise. After all, most state and national politicians are lawyers. The inverse is probably not true, but politics and the legal profession are not strangers.

Whether it is politics or not, however, is less important than the fact that these data indicate that the decision-making process is somewhat simpler than many have suggested. One does not have to go to the lengths that Woodward and Armstrong did to understand the process.⁷

Finally, the picture Table 1 paints for the press is not an encouraging one. The table goes from more favorable to less favorable from top to bottom. If you look at the dates on the cases, there are more recent cases toward the bottom of the table. The Court appears to be becoming slightly less favorable to the press as time goes on. There also is not much indication that block voting is diminishing. With all three members of the pro-press block mentioned in retirement rumors of late, the solidity of the anti-press block is clear cause for discouragement.

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TABLE 1

How Supreme Court Justices Voted on Press Cases, 1971-80

	R	B	B	W	P	S	M	B
	e	u	l	h	o	t	a	r
	h	r	a	i	w	e	r	e
	n	g	c	t	e	w	s	n
	q	e	k	e	l	a	h	n
	u	r	m		l	r	a	a
	i	a				t	l	n
	s	n						
	t							
Kois v. Wisconsin (1972)	x	x	x	x	x	x	x	*
Roaden v. Kentucky (1973)	x	x	x	x	x	x	x	*
Miami Herald v. Tornillo (1974)	x	x	x	x	x	x	x	*
Jenkins v. Georgia (1974)	x	x	x	x	x	x	x	*
Nebraska Press Association (1976)	x	x	x	x	x	x	x	*
McKinney v. Alabama (1976)	x	x	x	x	x	x	x	*
Oklahoma Publishing Co. (1977)	x	x	x	x	x	x	x	*
Cox v. Cohn (1975)		x	x	x	x	x	x	*
Murphy v. Florida (1975)		x	x	x	x	x	x	*
Virginia Board of Pharmacy (1976)		x	x	x	x	x	x	*
Carey v. Population Services (1977)			x	x	x	x	x	*
CBS v. Dem. Nat. Con. (1973)	<u>x</u>	<u>x</u>	x	x	x	x		
Bigelow v. Virginia (1975)		<u>x</u>	x		x	x	x	
Con Ed. v. PSC (1980)		<u>x</u>		x	x	x	x	
Flower v. U.S. (1972)				x	x	x	x	*
Papish v. Board of Curators (1973)				x	x	x	x	*
S.E. Promotions v. Conrad (1975)		<u>x</u>			x	x	x	
Erznoznik v. Jacksonville (1975)		<u>x</u>			x	x	x	
Lehman v. Shaker Heights (1974)					x	x	x	*
Zacchini v. Scripps-Howard (1977)					x	x	x	*
Young v. American Mini Th (1976)				<u>x</u>		x	x	
Bates v. Arizona Bar (1977)		<u>x</u>	<u>x</u>			x	x	
Pacific v. FCC (1978)			<u>x</u>			x	x	
Gannett v. DePasquale (1979)		<u>x</u>	<u>x</u>				x	
Bransburg v. Hayes (1972)						x	x	*
Lloyd v. Tanner (1972)						x	x	*
Paris v. Slaton (1973)						x	x	*
Kaplan v. California (1973)						x	x	*
U.S. v. 12 Rolls Super 8 (1973)						x	x	*
U.S. v. Orito (1973)						x	x	*
Heller v. State of New York (1973)						x	x	*
Alexander v. Virginia (1973)						x	x	*
Miller v. California (1973)						x	x	*
Ward v. Illinois (1977)						x	x	*
Herbert v. Lando (1979)						x	x	*
Pittsburgh Press v. HRC (1973)	<u>x</u>	<u>x</u>				x		
Saxbe v. Washington Post (1974)				<u>x</u>			x	
Gertz v. Welch (1974)	<u>x</u>		<u>x</u>				x	
Pell v. Procurner (1974)							x	*
Hutchinson v. Proxmire (1979)							x	*
Woolston v. Reader's Digest (1979)							x	*
Nixon v. Warner Communications (1978)						<u>x</u>		
Friedman v. Rogers (1979)						<u>x</u>		
Cantreal v. Forest City Pub (1974)								*

Coefficient of Reproducibility .95

* Scale Type

Citations for Cases in Table 1

(in order in which they appear in table)

Kois v. Wisconsin, 92 S.Ct. 2245 (1972)
Roaden v. Kentucky, 93 S.Ct. 2796 (1973)
Miami Herald v. Tornillo, 94 S.Ct. 2831 (1974)
Jenkins v. Georgia, 94 S.Ct. 2750 (1974)
Nebraska Press Association v. Stuart, 96 S. Ct. 2791 (1976)
McKinney v. Alabama, 96 S.Ct. 1189 (1976)
Oklahoma Publishing Co. v. District Court for Oklahoma County, 97 S.Ct. 1045 (1977)
Cox v. Cohn, 95 S.Ct. 1029 (1975)
Murphy v. Florida, 95 S.Ct. 2035 (1975)
Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 96 S.Ct. 1817 (1976)
Carey v. Population Services International, 97 S.Ct. 2010 (1977)(1976) (1976)
CBS v. Democratic National Committee, 93 S.Ct. 2080 (1973)
Bigelow v. Virginia, 95 S.Ct. 2222 (1975)
Consolidated Edison v. Public Service Commission, 100 S.Ct. 2326 (1980)
Flower v. U.S., 92 S.Ct. 1843 (1972)
Papish v. Board of Curators, University of Missouri, 93 S.Ct. 1197 (1973)
Southeastern Promotions v. Conrad, 95 S.Ct. 1239 (1975)
Erznoznik v. Jacksonville, 95 S.Ct. 2268 (1975)
Lehman v. Shaker Heights, 94 S. Ct. 1741 (1974)
Zacchini v. Scripps-Howard, 97 S.Ct. 2849 (1977)
Young v. American Mini Theatres, 96 S.Ct. 2440 (1976)
Bates and Van O'Steen v. Bar of Arizona, 97 S.Ct. 2691 (1977)
Pacific Foundation v. F.C.C., 98 S.Ct. 3026 (1978)
Gannett v. DePasquale, 99 S.Ct. 2898 (1979)
Bransburg v. Hayes, 92 S.Ct. 2646 (1972)
Lloyd v. Tanner, 92 S.Ct. 2219 (1972)
Paris Adult Theatre v. Lewis R. Slaton, 93 S.Ct. 2628 (1973)
Kaplan v. California, 93 S.Ct. 2680 (1973)
U.S. v. 12 Rolls of Super 8 mm. Film et al, 93 S.Ct. 2665 (1973)
U.S. v. George Joseph Orito, 93 S.Ct. 2674 (1973)
Heller v. State of New York, 93 S.Ct. 2789 (1973)
Alexander v. Virginia, 93 S.Ct. 2803 (1973)
Miller v. California, 93 S.Ct. 2607 (1973)
Ward v. Illinois, 97 S.Ct. 2085 (1977)
Herbert v. Lando, 99 S.Ct. 1635 (1979)
Pittsburgh Press v. Pittsburgh Human Relations Commission, 93 S.Ct. 2591 (1973)
Saxbe v. Washington Post, 94 S.Ct. 2811 (1974)
Gertz v. Welch, 94 S.Ct. 2997 (1974)
Pell v. Procurner, 94 S.Ct. 2800 (1974)
Hutchinson v. Proxmire, 99 S.Ct. 2675 (1979)
Wolston v. Reader's Digest, 99 S.Ct. 2701 (1979)
Nixon v. Warner Communications, 98 S.Ct. 1306 (1978)
Friedman v. Rogers, 99 S.Ct. 887 (1979)
Cantrell v. Forest City Publishing Co., 95 S.Ct. 465 (1975)

Footnotes

¹Nebraska Press Association v. Stuart, 96 S.Ct. 2791 (1976); Richmond Newspapers v. Commonwealth of Virginia, 100 S.Ct. 2814 (1980).

²Gertz v. Welch, 94 S.Ct. 2997 (1974); See also Harry W. Stonacipher and Robert Trager, "The Impact of Gertz on the Law of Libel," Journalism Quarterly, 53:609-18 (1976).

³See Louis L. Guttman, "The Basis for Scalogram Analysis," in G. M. Marshall, ed., Scaling: A Sourcebook for Behavioral Scientists (Chicago: Aldine Publishing Co., 1974); See also Keith R. Stamm, "Measurement Decisions," in Guido H. Stempel III and Bruce H. Westley, eds., Research Methods in Mass Communication (Englewood Cliffs, N.H.: Prentice-Hall, 1981), pp. 92-95.

⁴Those cases are Houchins v. KQED, 98 S.Ct.2588(1978); Zurcher v. Stanford Daily, 98 S.Ct.1970 (1978); Landmark Communications v. Virginia, 98 S.Ct.1535 (1978); Post v. NCCB, 98 S.Ct. 2096(1978); Smith v. Daily Mail Publishing Co., 99 S.Ct. 2667 (1979); and Richmond Newspapers v. Commonwealth of Virginia, 100 S.Ct. 2814.

⁵Harold J. Spaeth, "Unidimensionality and Item Invariance in Judicial Scaling," Behavioral Scientists, 10:290-304 (1965).

⁶George Padgett, "A Qualitative Analysis of United States Supreme Court Decision-Making Relative to First Amendment Issues of Free Speech and Free Press," unpublished Ph.D. dissertation, Ohio University, 1980.

⁷Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (New York: Simon and Schuster, 1979).